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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,
v.
THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. When a Native American tribe has accrued causes of action against third parties for trespass to its land held under aboriginal title, may the United States take those causes of action without payment of just compensation?

2. Can the United States avoid payment for taking some of the Inupiat Eskimos' causes of action by retroactively extinguishing portions of their aboriginal title?

3. Do statutes, regulations and the common law that specifically prohibited entry upon lands used and occupied by Inupiat Eskimos give rise to legally enforceable claims for money damages against the United States for breach of fiduciary duty by its officers who failed to prevent, or attempted to authorize, trespasses to those lands?

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Inupiat Community of the Arctic Slope, the recognized tribal representative of the Inupiat Eskimos, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINIONS BELOW

The opinion of the Court of Claims, not yet reported, appears in the Appendix hereto (App. 1a-18a). The opinion of the Court of Appeals for the Ninth Circuit in the related case of *United States v. Atlantic Richfield Company* is reported at 612 F.2d 1132 (1980), *cert. denied*, 449 U.S. 888 (1980). The opinion of the district court in that case is reported at 435 F.Supp. 1009 (D. Alaska 1977). The opinion in the related case of *Edwardsen v. Morton* is reported at 369 F.Supp. 1359 (D.D.C. 1973).

JURISDICTION

The judgment of the Court of Claims (App. 18a) was entered on June 2, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 4 of the Act of December 18, 1971, the Alaska Native Claims Settlement Act, 43 U.S.C. § 1603:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinquished.

Section 8 of the Act of May 17, 1884, ch. 53, 23 Stat. 24, 26:

> [T]he Indians or other persons in said district [of Alaska] shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such

persons may acquire title to such lands is reserved for future legislation by Congress.

Section 14 of the Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1100:

> [N]one of the provisions of the last two preceding sections of the act shall be so construed as to warrant the sale of any lands . . . to which the natives of Alaska have prior rights by virtue of actual occupation . . . .

Section 27 of the Act of June 6, 1900, ch. 786, 31 Stat. 321, 330:

> The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use and occupation . . . .

43 C.F.R. § 2091.6-3 (1981):

> Lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others.

STATEMENT OF THE CASE

The Arctic Slope of Alaska is a remote area of Northern Alaska lying between the Brooks Range and the Arctic Ocean. The Inupiat Eskimos have lived and hunted there for thousands of years. This use and occupancy gave rise, under settled federal common law, to a right of possession that could be terminated by the sovereign without compensation but which, until terminated, was "as sacred as the fee-simple of the white." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *accord*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 668-69 (1974).

Until the 1960's there was virtually no non-Eskimo activity on the Arctic Slope. In the mid-1960's, however, the State of Alaska began making selections of land on the Arctic Slope under color of the Alaska Statehood Act,

72 Stat. 339, and issuing conditional oil and gas leases on "tentatively approved" land selections. Because, under the Statehood Act, Native land was expressly excluded from selection,[1] the Inupiats and the Bureau of Indian Affairs protested Alaska's actions.[2]

In November 1966, in response to the Native protests, the Secretary of the Interior suspended all tentative approvals of Alaska's land selections and all federal leasing in Alaska.[3] Oil exploration continued, however, both under color of conditional state leases and without any authorization whatsoever. In February 1968, Atlantic Richfield struck oil at its Prudhoe Bay State No. 1 well, and the stream of exploration on the Eskimos' Arctic Slope lands became a flood:

> Within the space of a few months, oil explorations uprooted and destroyed the wilderness character of an area larger than Massachusetts. By January 1969, more than a dozen companies holding exploration leases were in a mad scramble for a piece of the action, jockeying for position in haste and secrecy, driven by sheer compulsion as well as need. Seismic crews roamed the area in amphibious vehicles drilling the subsurface and testing it with explosives.[4]

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[1] Alaska Statehood Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 339, §§ 4, 6 (1958), 48 U.S.C., note preceding § 21; *see Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970).

[2] The history of the protests is discussed in S. Rep. No. 92-405, 92nd Cong., 1st Sess. 96-97 (1971).

[3] The suspension is described in S. Rep. No. 92-405, 92nd Cong., 1st Sess. 97 (1971); *see also* P.L.O. 4582, 34 Fed. Reg. 1025 (1969) (extending land freeze).

[4] From, "Hickel and the Arctic," *Field and Stream* (Nov. 1969), quoted in *Hearings on the Status of the Proposed Trans-Alaska Pipeline Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess., pt. 2, 275 (1969).

These actions of the State of Alaska and the oil companies resulted in massive trespasses to Inupiat lands—trespasses investigated and alleged by the United States in related litigation as including:

(a) removing vast quantities of sand and gravel;

(b) disturbing migratory or feeding patterns of sea mammals, fish, and game to the detriment of Eskimo hunting and fishing;

(c) damaging physical property such as buildings, campsites, hunting and trapping grounds, cellars and caches;

(d) killing game animals to the significant detriment of the Eskimos;

(e) constructing airfields, buildings, roads, living units, drilling pads, and other structures;

(f) damaging Eskimo graveyards and consecrated areas;

(g) extracting quantities of oil and gas; and

(h) obtaining geophysical information of great value.[8]

These trespass causes of action accrued to the Inupiats in the 1960's. They are of major importance to the Inupiats both in dollars of damages and as a means to redress a deeply felt wrong.

On December 18, 1971, the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-27 ("ANCSA") became law. Section 4 of the Act terminated all aboriginal title in Alaska. The Inupiats, who had opposed the Act as unfairly distributing their land and oil wealth to others, understood the Act not to terminate their substantial pre-Act trespass causes of action.

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[8] Complaint of the United States, ¶ 10, pp. 6-7, *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

After ANCSA's enactment and in settlement of the related case of *Edwardsen v. Morton*,[6] the United States investigated the trespass claims, found that there was credible evidence of substantial damage and, joined by the Inupiats as intervenors, sued the oil companies and the State of Alaska. Their complaints, however, were dismissed on the ground that the United States had extinguished both aboriginal title and the Inupiat's causes of action in trespass in Section 4 of ANCSA. *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).[7] The Ninth Circuit did not reach the issue whether the Inupiats' causes of action were property protected by the Fifth Amendment but noted that if they were

> the Inupiats might recover as just compensation from the United States the same amount that they could have recovered from the trespassing private defendants in the absence of the Act.

612 F.2d at 1139. This Court denied petitions for writs of certiorari by the United States and the Inupiats.[8]

The Inupiats filed the present petition in the Court of Claims on December 16, 1977, less than six years after

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[6] 369 F. Supp. 1359, 1378-79 (D.D.C. 1973), *dismissed as moot* (Feb. 16, 1977). In this case the Inupiats' sought, *inter alia*, an accounting from the United States for money it had received from pre-ANCSA trespassers to Inupiat lands. After the district court denied summary judgment on this issue to the federal defendants, the case was settled upon the Secretary of the Interior's agreement to investigate the claims and to bring suit against the oil companies and the State of Alaska on those claims he found were factually meritorious.

[7] In *Edwardsen v. Morton, supra*, Judge Oliver Gasch of the District of Columbia ruled that the Inupiat's causes of action had not been extinguished by ANCSA in part because those causes of action were property rights protected by the Fifth Amendment. 369 F. Supp. at 1379.

[8] 449 U.S. 888 (1980). Justice Blackmun would have granted certiorari; Justices Stewart and Powell took no part in the Court's decison.

the effective date of ANCSA. The Court of Claims had jurisdiction over their claim against the United States under 28 U.S.C. § 1505. Essentially, the Inupiats alleged that their pre-ANCSA causes of action against third parties were property protected by the Fifth Amendment; that this property had been taken by the United States; and that they have not received just compensation for the taking. The Inupiats also alleged that the United States was liable to them for breaches of fiduciary duty in failing to protect their land from trespass and for denials of due process of law in permitting selections of Inupiat land to be made without affording the Inupiats a hearing.

The Court of Claims granted the United States' motion to dismiss. That court held that since the Inupiats' title to land was extinguishable without payment, their existing trespass actions against third parties were also extinguishable without payment of just compensation (App. 8a-13a). The court further held that the United States' trust responsibility did not give rise to an action for money against the United States (App. 13a-17a). Finally, the court held that it had no jurisdiction over claims for money based on violations of the due process clause.[9]

REASONS FOR ISSUING THE WRIT

No court has ever heard the Inupiats' trespass actions on the merits, or determined whether just compensation has been paid for their taking. Certiorari should be granted to review the decision of the Court of Claims because that decision conflicts with settled law as expressed in the decisions of this court.

I. THE DECISION OF THE COURT OF CLAIMS IS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

1. Under settled law, land used and occupied by Native Americans since time immemorial is deemed held by

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[9] App. 17a-18a. Petitioner does not seek certiorari on this issue.

them under aboriginal title. *E.g.*, *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345 (1941); *accord*, *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945). Aboriginal title gives Indians no permanent ownership rights against the United States, which can, acting through Congress, terminate such title without compensation. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

Until extinguished, however, aboriginal title does give Indians important rights of possession. Since *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), this Court has repeatedly emphasized that under federal common law Indians are entitled to exclusive possession and quiet enjoyment of their aboriginal lands, rights "as sacred as the fee-simple of the whites." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *accord*, *Oneida Indian Nation v. County of Oneida*, 441 U.S. 661, 668-69 (1974).[10] Until the sovereign extinguishes aboriginal title, the Indians have "a legal as well as a just claim to retain possession of [their lands] . . . ." *Johnson v. M'Intosh*, 21 U.S., at 573.

> As against any but the sovereign, original Indian title was accorded the protection of full fee ownership, but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will.

United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946). *Tee-Hit-Ton* itself expressly reaffirmed the guaranteed status accorded Indian's possessory rights "which the sovereign grants and protects against intrusion by third parties . . . ." *Id.* at 279.

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[10] Additional cases holding to the same effect are: *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 345 (1941); *Cramer v. United States*, 261 U.S. 219, 227 (1923); *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831) (Baldwin J., concurring); *see Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574, 603 (1823).

Prior to the extinguishment of aboriginal title, therefore, no one has a right to occupy or trespass on Indian land without the Indians' consent. See, *e.g.*, *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345, 359-60 (1941); *Cramer v. United States*, 261 U.S. 219, 229, 234 (1923).

Indian tribes with a right to possession free from trespass also, of course, have a right to recover damages from trespassers.[11] Trespass claims are based not on ownership of land but on possession. Even a tenant at will has a right to recover for trespasses by third parties.[12]

Because the right to redress for trespass is compensation for interference with *possession*, not ownership, an occupant of land is entitled to redress—regardless of the underlying ownership or the nature of the occupancy—so long as the occupant's right of possession is superior to that of the trespasser. Thus, a trespass action can be maintained for interference with possession

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[11] Possessory rights in land held by Indian tribes include the power to command the aid of the law against trespassers, coupled with the privilege to use reasonable force to exclude trespassers. Indeed, an assertion of possessory right is meaningless if these elements are lacking. The right to protection of tribal possession through actions of ejectment, trespass or other similar possessory suits was affirmed early in the nation's history.

F. Cohen, *Handbook of Federal Indian Law* 523 (1982 ed.) (footnotes omitted); *see id.* at 252, 524; *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850) (upholding ejectment action); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1857) (upholding trespass action); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974) (action in the nature of ejectment).

[12] A cause of action for trespass accrues when someone intrudes on land that another person possesses or has the right to possess. *Restatement (Second) of Torts* §§ 157, 158 (1965). No legal title is required to support an action for trespass. *Id.* § 157, Comment b (1965); W. Prosser, *The Law of Torts* § 13 (4th ed. 1971). A mere tenant at will can maintain a trespass action. 49 Am. Jur. 2d *Landlord and Tenant* § 292 (1970).

even though no ownership rights exist and even where the title is transferred away after the trespass [13] or there is a complete taking of title by the sovereign.[14] In *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1857) this Court upheld an Indian trespass action against non-Indians on the express ground that the Indians had a possessory right superior to that of the trespassers even though the Indians' ownership rights had previously been terminated by the United States.

Thus, when the trespasses occurred on the Arctic Slope before the United States' termination of the Inupiats' aboriginal title in the ANCSA, causes of action for trespass and other torts accrued to the Inupiats against the trespassers. The Inupiats were entitled to present these accrued causes of action to the courts for adjudication and award of money damages, whether or not they had aboriginal title at the time of trial.

2. Prior litigation establishes finally that ANCSA took the Inupiats' trespass actions. *United States v. Atlantic Richfield Co.*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980). This was a taking of valuable property rights for which the Inupiats are entitled to just compensation.

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[13] "The fact that a plaintiff transfers the property after the trespass does not divest him of his right of recovery if the injury was inflicted during the time of his control of the property." 75 Am. Jur. 2d "Trespass" § 26 (1974); *Bowman v. Hibbard*, 314 Ky. 688, 236 S.W.2d 938, 941 (1951).

[14] A condemnee's causes of action for prior trespasses to possession remain in existence unless litigated in the condemnation proceedings and expressly provided for in the award. *See, e.g., Wehrum v. Lincolnwood*, 91 Ill. App. 2d 418, 235 N.E.2d 343 (1968); *Cochran Coal v. Municipal Management Co.*, 380 Pa. 397, 110 A.2d 345 (1955)' *citing with approval Shevalier v. Postal Telegraph Co.*, 22 Pa. Super. 506 (1903), and *Keil v. Chartiers Val Gas Co.*, 131 Pa. 466, 19 A. 78, 79 (1890); *Tuttle v. State*, 138 Misc. 1, 244 N.Y.S. 553 (1930); *Terhune v. Gorham*, 225 Ky. 249, 8 S.W.2d 431 (1928); *Fort Worth v. Dietert*, 271 S.W.2d 299 (Tex. Civ. App. 1954); *Texas Pipeline Co. v. Ennis*, 57 S.W.2d 178 (Tex. Civ. App. 1933); *rev'd on other grounds*, 127 Tex. 470, 93 S.W.2d 148 (1933); *see generally* 33 A.L.R.3d 1132 and cases cited therein.

This court has consistently held that accrued causes of action are property rights protected by the Fifth Amendment.

> A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve any wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged.

Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 151 U.S. 1, 19 (1894); *accord, Logan v. Zimmerman Brush Co.*, —— U.S. ——, 102 S.Ct. 1148 (1982).[18]

The holdings of this Court, we submit, are clear that a trespass by someone other than the United States to land to which Indians hold unextinguished aboriginal title results in a right of action by the Indians against the trespasser. This right of action, in turn, is a property right that cannot be taken by Congress without payment of just compensation.

3. The Court of Claims, in ruling to the contrary, cites no case holding that a tribe's trespass action—against third parties—is less protected than the trespass actions of non-Indians. The court reasoned that (App. 12a):

> The right to sue for trespass is one component of the bundle of rights that aboriginal title provides but which Congress may grant, limit, or extinguish as it sees fit. When, as an incident to extinguishing the

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[18] Other cases to the same effect: *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); *Coombes v. Getz*, 285 U.S. 434, 442 (1932); *Farberwerke, Vormals, Meister, Lucius & Bruning v. The Chemical Foundation, Inc.*, 39 F.2d 366, 371 (3d Cir. 1930), *aff'd*, 283 U.S. 152 (1931); *Ettor v. City of Tacoma*, 228 U.S. 148 (1913); *Cincinnati v. Louisville & N.R.R.*, 223 U.S. 390, 400 (1912); *Pritchard v. Norton*, 106 U.S. 124, 132 (1882); *Osborn v. Nicholson*, 80 U.S. (13 Wall.) 654 (1872); *Pacific M. S.S. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1865).

aboriginal title itself, Congress in the Settlement Act also extinguished the Indians' claims for trespass to the lands possessed under that title, it made a political decision not subject to judicial reexamination. Congress's authority to extinguish aboriginal title without payment also authorized it without payment to extinguish the trespass claims based upon that title. *Cf. Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) (purely statutory claims subject to extinction after vesting before judgment).

This reasoning is flawed. It ignores the difference between the Indians' unprotected ownership rights against the United States and their protected rights of possession against third parties. There is no sovereign obligation to pay for extinguishing aboriginal title, but there is an obligation on third parties to pay for their trespasses on aboriginal title. Indians have no right of action against the sovereign for extinguishing aboriginal title, but they do have rights of action against persons who trespass on that title before it is extinguished. And although these rights of action—like other property—may be taken by the Government, just compensation must be paid for the taking.

When the trespass occurred in the 1960's, the Inupiat's aboriginal title was *not* extinguished. When the Inupiats' right to redress for uncontested interference with possession—trespass causes of action—accrued, those causes of action became legally protected rights wholly separate from the Inupiats' rights to the land that was trespassed against. The Fifth Amendment's protection applied to the Inupiats' causes of action even though it did not require payment for their underlying interest in the land.[16]

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[16] The situation is similar to that of a tenant at will. Because the right to damages for trespass is based on occupancy rather than ownership, even an unprotected occupant receives a protected right to redress for trespass. For example, a tenant at will can be evicted at any time, but if during a time of rightful occupancy a third

Just as in *Logan v. Zimmerman Brush Co.*, —— U.S. ——, 102 S.Ct. 1148 (1982), where the Illinois legislature could (and did) repeal the statute giving rise to the employment discrimination claim in that case, see 449 U.S. at —— n.1, 102 S.Ct. at 1152 n.1, so here the fact that Congress could (and did) take the Inupiats' aboriginal title to land without paying just compensation does not mean that causes of action for compensation that accrued before the taking are not constitutionally protected property. *Accord, Coombes v. Getz*, 285 U.S. 434, 442 (1932); *Mondou v. New York, New Haven, & Hartford Railroad Co.*, 223 U.S. 1, 50 (1912).

The Court of Claims' passing reference ("*Cf.*") to the Second Circuit's decision in *Battaglia v. General Motors* (App. 12a) shows the weakness of its argument. No case of this Court or of the Courts of Appeals can be cited that authorizes the kind of uncompensated taking of causes of action present here. Even *Battaglia* refers only to purely statutory claims. Yet the Inupiat claim here is a federal common law claim established by years of this Court's jurisprudence. It is not a statutory claim. Moreover, to the extent *Battaglia* has any relevance, it is of questionable authority in light of this Court's decision last Term in *Logan v. Zimmerman Brush Co., supra*, which recognizes that even a statutory

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party comes on the tenant at will's land and destroys his house, the tenant has a protected right to redress. Nothing the fee owner might do in terminating the tenancy can affect the tenant at will's accrued cause of action against that third party.

The Indian's aboriginal rights of possession are at least as great as those of a tenant at will. *See* 18 Op. Att'y. Gen. 563 (1887). Like a tenant at will, the Indians' right of occupancy may be terminated without compensation (although in the case of the Indian an act of Congress is required), but until terminated, the Indians' right of occupancy is "as sacred as the fee-simple of the whites." The Indian, like the tenant at will, is entitled to redress for wrongful interference with his occupancy, and if his accrued right to redress is taken, there must be just compensation.

claim creates a cause of action that is subject to constitutional protection.

The Court of Claims' suggestion that Congress' taking of Inupiat trespass causes of action was a "political decision not subject to judicial re-examination" (App. 12a), further reflects the weakness of its holding. The concept that Indian legislation is immune from judicial review under the Fifth Amendment was expressly repudiated by this Court in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-84 (1977). Whether, how and when, Indian property is to be taken by the sovereign may be nonjusticiable in some cases, but once a taking occurs, the questions whether compensation is due and what compensation is just are always justiciable. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 416-417 (1980); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

As to some of the Inupiats' causes of action, the Court of Claims also held that because § 4(a) of ANCSA had retroactively extinguished portions of the Inupiats' aboriginal title, the third party entries on those lands were not trespasses.[17] But this is no more than verbal sleight of hand. Before ANCSA the Inupiats had valuable rights of action against these trespassers. After

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[17] App. at 7a. The Court below based this ruling on the Ninth Circuits' holding in *Atlantic Richfield*, 612 F.2d at 1135, and further ruled that the Inupiats were collaterally estopped from challenging that ruling of law (App. 8). Even assuming that collateral estoppel applies to a pure question of law, it does not apply here. Under 28 U.S.C. §§ 1346, 1491, the Court of Claims has exclusive jurisdiction over taking claims in excess of $10,000. The Ninth Circuit in *Atlantic Richfield* could not decide whether a taking of property had occurred that required compensation and, indeed, expressly stated that it had not. 612 F.2d at 1139. Regardless of the characterization placed on ANCSA in *Atlantic Richfield*, the Inupiats are entitled to have the Court of Claims review section 4(a) of that Act to determine whether it took property for which just compensation is required.

ANCSA, those rights were gone. However the process is characterized, the result is that property rights are taken.

> [A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart J., concurring); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922) (shipowner with vested right to refund of illegal tolls may not have his cause of action taken by a statute retroactively ratifying collection of the tolls).

4. Certiorari should be granted to review the Court of Claims' decision, contrary to this Court's settled precedents, that the Inupiats' common law causes of action can be taken by Congress without payment.[18]

II. WHETHER THE UNITED STATES HAD A FIDUCIARY DUTY ENFORCEABLE BY MONEY JUDGMENT TO PROTECT THE INUPIATS FROM TRESPASS IS AN IMPORTANT FEDERAL QUESTION DESERVING THIS COURT'S ATTENTION

The Inupiats presented as an alternative claim, for the same damages as the claim for ANCSA's taking of trespass causes of action, a claim for ANCSA's taking of certain causes of action for breach of fiduciary duty which had accrued to the Inupiats against the United States before the ANCSA. The Court of Claims ruled that no claim for money damages for such breach could

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[18] It is possible that the Court of Claims sought reasons to rule against the Inupiats because they received both land and money under ANCSA. But that issue cannot be decided on a motion to dismiss. Whether ANCSA's benefits are also just compensation for Inupiat trespass causes of action is a factual issue to be decided in a hearing on the merits. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980). At a minimum the Inupiats are entitled to that hearing.

be asserted because under *Mitchell v. United States*, 664 F.2d 265 (Ct. Cl. 1981), *cert. granted*, 50 U.S.L.W. 3963 (June 7, 1982) (No. 81-1748), sovereign immunity had not been waived (App. 13a-17a).

There is no question that the United States had a fiduciary duty to protect the Inupiat's land from trespass. The United States says so itself. In *United States v. Berrigan*, 2 Alas. Rpts. 442 (D. Alaska 1905), the United States, as trustees for a large group of Alaska Natives, successfully brought suit to enjoin trespass to land used by the Natives as a village site. In *United States v. Cadzow*, 5 Alas. Rpts. 125 (D. Alaska 1914), the United States, again acting as trustee for a communal Native group, successfully obtained injunctive relief against trespass to lands used or occupied by the Natives.

The Government has specifically acknowledged and affirmatively asserted its trust obligation to protect the Inupiats' right of occupancy to their aboriginal Arctic Slope lands. In its *Atlantic Richfield* complaint, the United States "as trustee" sought to recover damages for wrongful trespass "on lands held by the United States for the use and occupancy of the said Eskimos." [19] In response to interrogatories the United States answered under oath that it had had a trust relationship with the Inupiat Eskimos since the Treaty of Cession.[20]

But the Court of Claims held that the Inupiats have no right to enforce that fiduciary duty through suit against the trustee for money damages—that the statutes creating the trust responsibility cannot fairly be read as creating such liability (App. 13a-17a).

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[19] Amended complaint of the United States, ¶¶ I-II, p. 3, *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977).

[20] United States' answers to interrogatories of defendant Nabors Alaska Drilling, Inc., at 1-3 (Nov. 19, 1975), *United States v. Atlantic Richfield Co.*, *supra*.

This Court has this term issued a writ of certiorari to review the Court of Claim's decision in *Mitchell v. United States* on the same question but different statutes and a different fact situation.[21] The right of Native American tribes to sue the United States for current breaches of trust responsibility—and thus the only incentive of the United States to manage its trust lands with care—is very alive today in tribal contexts as well as with respect to individual allottees. The question deserves this Court's attention in the context of this case as well as in *Mitchell*.

III. JUSTICE REQUIRES THAT THE WRIT BE ISSUED

This case does not concern wrongs committed long ago to people long dead, which present compensation can never undo. The victims of these trespasses are very much alive, and the memory of the harsh tactics of the oil companies in disrupting their lives and desecrating their holy places is still vivid. There is no dispute that the Inupiats had valuable causes of action in trespass. There is no dispute that the United States, for what it viewed as pressing reasons of public policy, took those causes of action away. The Inupiats argue that they have never received just compensation for this admitted taking. No court has ever heard that claim. Unless the judgment below is reversed, no court ever will. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But the Court of Claims has said that the Inupiats' right of

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[21] *Mitchell* concerns management of allottees' timber estates giving considerable discretion to the allottees. Here the basic protection of tribal property wholly under the United States' trust responsibility is at issue.

action—unlike a white man's[22]—is not constitutionally protected. The inability of the Inupiats to get a hearing on the merits of their claim in any court leaves them festering with frustration and injustice.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision of the Court of Claims dismissing the Inupiats' petition should be reversed.

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[22] Compare *Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981) (Powell, J., concurring in part and dissenting in part) (footnote omitted): "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."